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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 LYUDMYLA PYANKOVSKA,

8 Plaintiff(s),

9 v.

10 SEAN ABID, et al.,

11 Defendant(s).

Case No. 2:16-CV-2942 JCM (PAL)

ORDER

12
13 Presently before the court is defendant John Jones' motion to dismiss. (ECF No. 29).
14 Defendants Sean Abid and Angela Abid filed joinders to defendant Jones' motion. (ECF Nos. 42,
15 43). Plaintiff Lyudmyla Pyankovska, who represents herself *pro se*, filed a response (ECF No.
16 40), to which defendant Jones replied (ECF No. 45).

17 Also before the court is plaintiff's motion for leave to file an amended complaint. (ECF
18 No. 41). Defendant Jones filed a response (ECF No. 53), to which defendant Sean Abid joined
19 (ECF No. 55). Plaintiff thereafter filed a reply. (ECF No. 56).

20 Also before the court is plaintiff's "motion to take judicial notice." (ECF No. 26).
21 Defendants Sean Abid and Angela Abid filed responses (ECF Nos. 27, 28), to which plaintiff
22 replied (ECF No. 35).

23 Also before the court is defendant Jones' "motion to disregard." (ECF No. 58). Plaintiff
24 has not filed a response, and the time for doing so has since passed.

25 **I. Facts**

26 Plaintiff and defendant Sean Abid are former spouses who got divorced on February 17,
27 2010. (ECF No. 1). Pursuant to the divorce decree, the parties agreed to joint legal and physical
28 custody of Aleksandr Abid (hereinafter "Sasha"), their minor child. *Id.*

1 On or about January 9, 2015, plaintiff filed a motion for contempt of court against
2 defendant Sean Abid. *Id.* Sometime thereafter, defendant Sean Abid inserted a recording device
3 into Sasha's school backpack with the intent of intercepting communications between Sasha,
4 plaintiff, and plaintiff's husband. *Id.* The device recorded multiple conversations between Sasha
5 and plaintiff. *Id.* Defendant Sean Abid brought digital copies of these conversations to his lawyer,
6 defendant Jones, as well as transcribed portions of the recordings in typewritten form. *Id.*

7 Plaintiff first discovered the existence of the recordings on February 4, 2015, when
8 defendant Jones introduced them as exhibits to a countermotion to modify primary custody. *Id.*
9 Throughout the course of litigation, plaintiff discovered that defendant Sean Abid had deleted
10 portions of the recordings and erased the software that he used to edit the recordings. *Id.* The
11 court subsequently authorized defendants to give copies of the recordings and transcripts to expert
12 witness Dr. Holland to prepare for an interview of Sasha. *Id.*

13 The court ultimately ruled that the introduction of the recordings as independent evidence
14 would violate NRS 200.650, as defendant Sean Abid's procurement of such recordings did not
15 meet the requirements for the "vicarious consent doctrine." *Id.* However, the court ruled the
16 recordings admissible as a basis for the testimony and report of Dr. Holland. *Id.*

17 **II. Legal Standard**

18 *a. Motion to dismiss under 12(b)(6)*

19 A court may dismiss a complaint for "failure to state a claim upon which relief can be
20 granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain
21 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
22 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
23 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the
24 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

25 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
26 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
27 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation
28 omitted).

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
2 when considering motions to dismiss. First, the court must accept as true all well-pled factual
3 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
4 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
5 statements, do not suffice. *Id.* at 678.

6 Second, the court must consider whether the factual allegations in the complaint allege a
7 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
8 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
9 alleged misconduct. *Id.* at 678.

10 Where the complaint does not permit the court to infer more than the mere possibility of
11 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
12 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line
13 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

14 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
15 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

16 First, to be entitled to the presumption of truth, allegations in a complaint or
17 counterclaim may not simply recite the elements of a cause of action, but must
18 contain sufficient allegations of underlying facts to give fair notice and to enable
19 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

20 *Id.*

21 *b. Motion for leave to file an amended complaint*

22 Federal Rule of Civil Procedure 15(a) provides that “[t]he court should freely give leave
23 [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The United States Supreme Court
24 has interpreted Rule 15(a) and confirmed the liberal standard district courts must apply when
25 granting such leave. In *Foman v. Davis*, the Supreme Court explained:

26 In the absence of any apparent or declared reason—such as undue delay, bad faith
27 or dilatory motive on the part of the movant, repeated failure to cure deficiencies
28 by amendments previously allowed, undue prejudice to the opposing party by virtue
of allowance of the amendment, futility of the amendment, etc.—the leave sought
should, as the rules require, be “freely given.”

1 371 U.S. 178, 182 (1962).

2 Further, Rule 15(a)(1)(B) provides that “[a] party may amend its pleading once as a matter
3 of course within . . . 21 days after service of a responsive pleading or 21 days after service of a
4 motion under Rule 12(b) . . . whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(B). Local Rule 15-
5 1(a) states that “the moving party shall attach the proposed amended pleading to any motion to
6 amend” LR 15-1(a).

7 **III. Discussion**

8 *a. Motion to dismiss*

9 Defendant’s motion to dismiss accurately states that plaintiff Pyankovska, who represents
10 herself *pro se*, cannot serve as counsel for the other litigants. Further, defendant’s motion
11 accurately states that plaintiff’s federal anti-stalking claim fails as a matter of law. As plaintiff
12 acknowledges these defects in her motion to amend her complaint (ECF No. 41), the court will not
13 address the issues further. The court will dismiss all plaintiffs except for Lyudmyla Pyankovska
14 and will dismiss plaintiff’s anti-stalking claim.

15 *i. Wiretap Act claim*

16 Defendant Jones’ motion to dismiss plaintiff’s Wiretap Act claim is based primarily on
17 three strands of argument: a lack of scienter¹ functions as a complete bar to Wiretap Act liability;
18 defendant’s actions qualify for the litigation privilege; and defendant’s actions (and those of Mr.
19 Abid) are privileged under the First Amendment right to petition the government. Plaintiff
20 responds that the litigation privilege is not a valid defense to violations of the Wiretap Act.

21 18 U.S.C. § 2511 creates a federal cause of action in cases where a party intercepts,
22 discloses, or uses the contents of certain protected communications:

- 23 (1) Except as otherwise specifically provided in this chapter any person who—
24 (a) intentionally intercepts, endeavors to intercept, or procures any other person to
25 intercept or endeavor to intercept, any wire, oral, or electronic communication . . .
26 (c) intentionally discloses, or endeavors to disclose, to any other person the contents
of any wire, oral, or electronic communication, knowing or having reason to know
that the information was obtained through the interception of a wire, oral, or
electronic communication in violation of this subsection;

28 ¹ Stated another way, defendant asserts that a “good faith belief” that one’s conduct did not
violate the act is sufficient to negate liability.

1 (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or
2 electronic communication, knowing or having reason to know that the information
3 was obtained through the interception of a wire, oral, or electronic communication
in violation of this subsection . . .
4 . . . shall be subject to suit as provided in subsection (5).

5 18 U.S.C. § 2511. Subsection 5 creates a federal cause of action. *Id.* The private right of action
6 stems from 18 U.S.C. § 2520, subsection a.

7 A. *Vicarious consent*

8 As defendant's pleadings with this court place significant reliance upon the theory of
9 "vicarious consent," the court will first address whether the doctrine applies in this circumstance.

10 18 U.S.C. § 2511(2)(d) provides,

11 It shall not be unlawful under this chapter for a person not acting under color of law to
12 intercept a wire, oral, or electronic communication where such person is a party to the
13 communication or where one of the parties to the communication has given prior consent
14 to such interception unless such communication is intercepted for the purpose of
15 committing any criminal or tortious act in violation of the Constitution or laws of the
16 United States or of any State.

17 Defendant argues that § 2511(2)(d) renders defendant Abid's conduct in taping
18 conversations between Sasha and plaintiff lawful through the doctrine of "vicarious consent." The
19 doctrine allows a parent to consent to conduct on behalf of a child if consent is in the best interest
20 of the child. *Pollock v. Pollock*, 154 F.3d 601, 610-11 (6th Cir. 1998). The parent must have a
21 good faith and objectively reasonable belief that consent is in the child's best interest. *Id.*

22 The court in *Pollock* conducted an extensive review of the case law up to that point on
23 vicarious consent by one parent to record their child's conversation with the other parent, and
24 noted that courts tended to focus on the following factors: the age of the children, the location of
25 the recording, the type of alleged harm the other parent was inflicting upon the child, and whether
26 the "consenting" parent had custody over the child. *Id.* at 607-610 (citing *Thompson v. Dulaney*,
27 838 F.Supp. 1535 (D. Utah 1993); *Silas v. Silas*, 680 So.2d 368 (Ala. Civ. App. 1996); *Campbell*
28 *v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *State v. Diaz*, 308 N.J. Super. 504, 706 A.2d 264
(1998); *Williams v. Williams*, 229 Mich. App. 318, 581 N.W.2d 777 (1998); *West Virginia Dep't*
of Health & Human Resources v. David L., 192 W.Va. 663, 453 S.E.2d 646 (1994)).

Here, defendant Sean Abid placed a recording device in Sasha's backpack without Sasha's
consent with the purpose of proving that plaintiff was making disparaging comments to Sasha

1 regarding defendant. Defendant Abid thereafter recorded, transcribed, and distributed portions of
2 conversations between Sasha and plaintiff that occurred in plaintiff's home without the consent of
3 either party. And although Sean Abid had partial custody over Sasha, he did not have custody
4 over Sasha at the time the recordings were made. The doctrine of various consent does not make
5 18 U.S.C. 2511(2)(d) applicable on these facts.

6 *B. Scienter and good faith reliance*

7 Defendant's scienter and good faith arguments regarding the statute miss the mark. Under
8 18 U.S.C. § 2520, "a good faith reliance on . . . a court warrant or order . . . or a statutory
9 authorization . . . is a complete defense against any civil or criminal action brought under this
10 chapter or any other law." Defendant cites this language as standing for the proposition that if
11 someone believes their conduct does not violate the statute, then they cannot be held liable under
12 the statute.

13 Here, the term "statutory authorization" does not mean that defendant's belief that the
14 statute authorized him to intercept a communication serves as a defense. Rather, it means that a
15 party's reliance on a separate statute authorizing conduct that otherwise violates the Wiretap Act
16 serves as a complete defense. If the court were to adopt defendant's reading of the good faith
17 reliance language, then any time a defendant alleges a belief that his conduct did not violate the
18 Wiretap Act, he obtains a complete defense to liability. This is an unreasonable reading of the
19 Wiretap Act.

20 *C. Litigation privilege*

21 The litigation privilege does not, in the context of Wiretap Act claims, serve as a complete
22 bar to liability.² In *Babb v. Eagleton*, 616 F. Supp. 2d 1195 (N.D. Okla. 2007), the court held that
23 a "litigation privilege" does not create absolute immunity from Title III liability. *Id.* at 1207. The
24 court based its holding on three separate but connected reasons: cases applying the litigation
25 privilege applied it to state law claims, not federal claims; Tenth Circuit precedent "seems to forbid
26 applying 'state law or policy' as a defense to Title III liability;" and other "courts have allowed

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28 ² Neither party presented the court with controlling or persuasive federal authority
discussing litigation privilege in the context of the Wiretap Act.

1 Title III claims to proceed against attorneys even when the attorney used the intercepted
2 communication during the course of judicial proceedings.” *Id.*

3 This court agrees with the holding and reasoning of *Babb*, and will not apply a litigation
4 privilege to absolutely immunize defendant from Title III liability. *See id.*

5 *D. First Amendment*

6 “The Noerr-Pennington doctrine ensures that those who petition the government for redress
7 of grievances remain immune from liability for statutory violations, notwithstanding the fact that
8 their activity might otherwise be proscribed by the statute involved.” *White v. Lee*, 227 F.3d 1214,
9 1231 (9th Cir. 2000) (citing *Prof. Real Estate Invs., Inc. v Columbia Pictures Indus., Inc.*, 508 U.S.
10 49, 56 (1993) (“*PREI*”). In *White*, the court considered whether filing a lawsuit constituted
11 protected activity. *Id.* at 1231. The court concluded that “a lawsuit is unprotected only if it is a
12 ‘sham’—*i.e.*, ‘objectively baseless in the sense that no reasonable litigant could realistically expect
13 success on the merits.’” *Id.* (citing *PREI*, 508 U.S. at 60).

14 Here, defendant Jones’ introduction of evidence into the state court case constitutes
15 protected First Amendment activity. Although the *White* court discussed Noerr-Pennington
16 protection in the context of the right to bring suit, the court holds that its protection extends to the
17 right to introduce evidence so long as introduction of such evidence is not “objectively baseless in
18 the sense that no reasonable litigant could realistically expect [admissibility].” *See* 227 F.3d at
19 1231. Here, defendant Jones’ conduct deserves First Amendment protection as he introduced
20 relevant evidence to the state court proceedings and offered a good faith argument for
21 admissibility. *See id.*

22 *ii. Summary*

23 Plaintiff’s complaint fails to state a claim against defendant Jones upon which relief can be
24 granted. As defendant Jones’ complained-of conduct consisted solely of judicial advocacy that is
25 protected by the First Amendment, he cannot be held liable under the Wiretap Act or under
26 plaintiff’s other theories of liability. *See White*, 227 F.3d at 1231. However, the same cannot be
27 said of defendant Sean Abid, who plaintiff alleges actively participated in the interception of oral
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1 communications of third parties.³ Plaintiff's complaint states claims against defendant Sean Abid
2 upon which relief can be granted. Therefore, the court will grant defendant's motion to dismiss as
3 to the claims against defendant Jones but will allow the claims against defendant Sean Abid to
4 proceed. *See Twombly*, 550 U.S. at 570.

5 *b. Motion for leave to file an amended complaint*

6 Plaintiff requests leave to amend her complaint for the purpose of curing certain
7 deficiencies articulated in defendant's motion to dismiss. Plaintiff also seeks "to clarify the factual
8 allegations and causes of actions [sic]." (ECF No. 41). Defendant Jones argues that amendment
9 would be futile as plaintiff's complaint fails to state claims upon which relief can be granted and
10 because plaintiff's amendments introduce claims upon which relief cannot be granted. (ECF No.
11 53).

12 As an initial matter, plaintiff is not entitled to amend her complaint as a matter of right.
13 Defendant Sean Abid filed a responsive pleading on January 10, 2017, and defendant Jones filed
14 a motion to dismiss on January 10, 2017. As plaintiff did not file her motion to amend until April
15 7, 2017, she is not entitled to amend her complaint as a matter of right. Fed. R. Civ. P. 15(a)(1).
16 Therefore, plaintiff can amend her complaint only with leave of the court. Fed. R. Civ. P. 15(a)(2).

17 The court will grant plaintiff leave to file an amended complaint. Amendment should be
18 freely granted unless futile, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and *pro se* pleadings are
19 to be construed liberally, *Erickson v. Pardus*, 551 U.S. 89 (2007). Although her amended
20 complaint suffers from deficiencies articulated in defendant Jones' motion to dismiss, plaintiff's
21 amended complaint improves upon her original filing and adds cognizable causes of action.
22 Further, the only defendant to file a response to plaintiff's request, defendant Jones, will be
23 dismissed from the action. Therefore, leave to amend is appropriate in this case. *See Foman*, 371
24 U.S. at 182.

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28 ³ Defendant Jones' motion draws attention to the contrast between his conduct and
defendant Sean Abid's. *See* (ECF No. 29 at 5) ("Attorney Jones was made aware of, and provided,
portions of the recordings *only after they had been made.*") (emphasis in original).

